Appendix

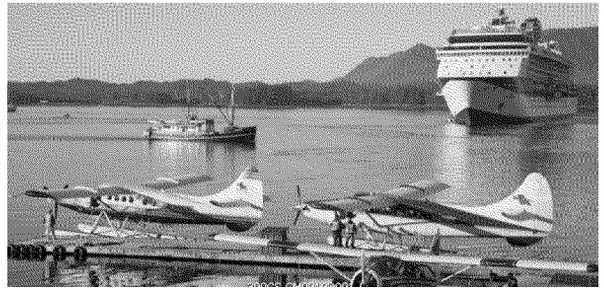
Additional Details on the CWR

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Jurisdictional; did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Jurisdiction included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Jurisdiction included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

These slides come from Regional presentations of the rule – at one point I believe they were OGC vetted

Unchanged Categories

- Traditional Navigable Waters (TNWs)
  - Tidally influenced or
  - Currently, historically, or potentially used in commerce

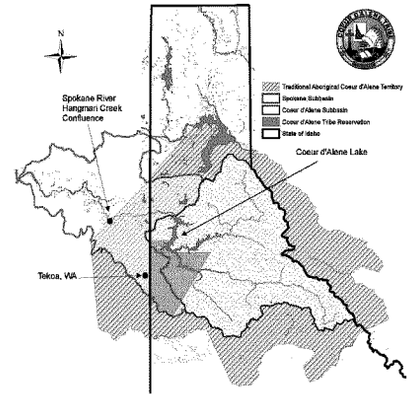


Ketchikan

- Territorial Seas
  - Open ocean out to 3 miles

Near Cape Flattery, WA

- Interstate Waters
  - Flow across, or form part of, state boundaries



Spokane River Watershed

- Impoundments
  - Of other Waters of the U.S.

Lake Simtustus, OR

NEW! Eliminated: "Isolated" Waters

- Waters with existing or potential link to interstate or foreign commerce (e.g., recreation, fishing, industrial use)

- Supreme Court (*SWANCC* & *Rapanos*)
  - Can't base jurisdiction solely on migratory bird use
  - Must have significant nexus to chemical, physical, & biological integrity of TNW, interstate water, or territorial sea

- Significant Nexus (SigNex)
  - More than insubstantial or speculative effect
  - Either alone or in combination with other similarly situated waters in the region
    - In the region = watershed that drains to TNW, interstate water, or territorial sea
    - Similarly situated = Perform similar functions & are sufficiently close together or to the other WOTUS to function together

Revised Categories:

Science Confirms SigNex

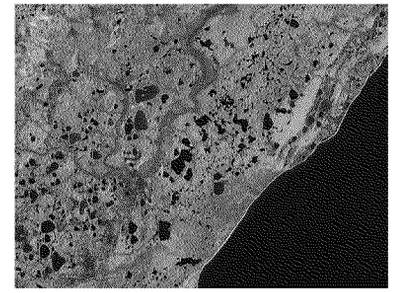
- *All* Tributaries that….
  - Meet the definition (new):
    - Contribute flow to TNW or interstate water
    - NEW: Have bed, banks, & OHWM (spatial discontinuity okay)
    - Natural, man-altered, or man-made
- Includes some ditches

Blue Creek, Shoshone-Paiute Tribes

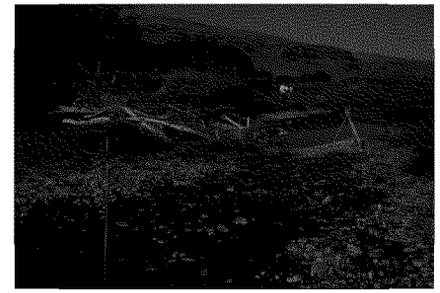
Skagit County, WA

- *All* Adjacent Waters
  - NEW: No longer just wetlands
    - Bordering, contiguous, neighboring
  - NEW: Neighboring (new definition) = starting within:
    - 1,500’ of high tide line or
    - First 1,500’ of 100-year floodplain or, otherwise,
    - 100’….

  of another water of U.S.
- NEW: Not if in established farming, ranching, or silviculture use



Arctic Coastal Plain, AK



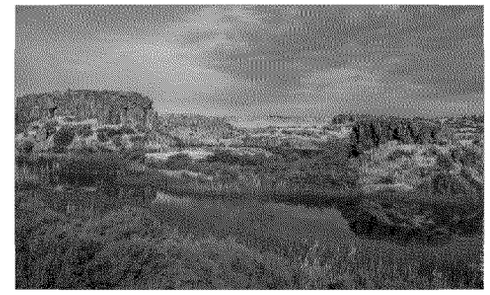
Umatilla River Floodplain Wetlands

NEW Case-specific SigNex Evaluation: (a)(7) AND (a)(8)

- Waters confirmed to be similarly situated
  - Carolina & Delmarva Bays
  - Pocosins
  - Texas Coastal Prairie Wetlands
  - Prairie Potholes
  - Western Vernal Pools *in California*

- Other Waters within…
  - 100-year floodplain of a TNW or interstate water or
  - 4,000’ of a TNW, interstate water, or tributary, or impoundment thereof

Table Rock Vernal Pool, Oregon



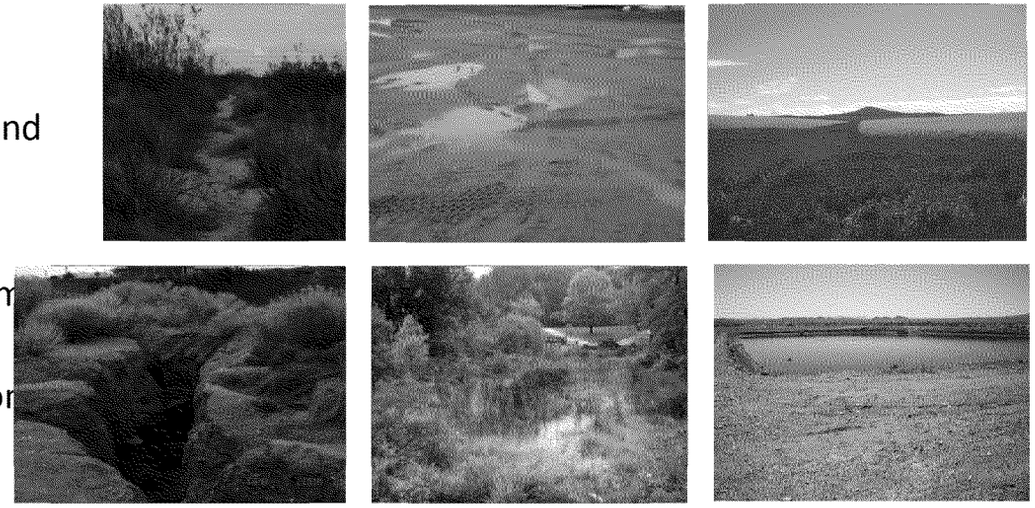
Channeled Scablands, Washington

- Functions Considered
  - Sediment trapping
  - Nutrient recycling
  - Pollutant trapping, filtering, transformation, or transport
  - Flood water retention/attenuation
  - Runoff storage
  - Flow contribution
  - Export of organic matter or food resources
  - Feeding, nesting, spawning, or rearing habitat for species from TNW, interstate water, or territorial sea

Exclusions: What *Aren't* WOTUS

- **Waste Treatment Systems**
- **Prior Converted Cropland**
- Revised **Ditches** that….
  - Have ephemeral flow & are not a relocated tributary
  - Have intermittent flow & neither are a relocated tributary nor drain wetlands
  - Do not flow to a TNW, interstate water, or territorial sea
- **Irrigated Areas** that would otherwise be dry land
- Revised **Stock Watering, Irrigation, Settling, Rice Growing, Log Cleaning, Cooling,** & similarly used lakes & ponds built in dry land
- **Reflecting Pools** built in dry land
- **Swimming Pools** built in dry land
- Small **Ornamental Waters** created in dry land
- **Construction & Mining Site Depressions** created in dry land
- Revised **Sand, Gravel, & Borrow Pits** excavated from land
- NEW! **Gullies & Rills** that don't meet the definition "tributary"

- NEW! **Non-wetland Swales**
- NEW! Lawfully constructed **Grassed Waterways**
- NEW! **Puddles**
- NEW! **Groundwater**
- NEW! **Stormwater conveyance, treatment, or storage features** constructed in dry land
- NEW! **Wastewater recycling features** (detention & retention basins, groundwater recharge basins, percolation ponds, distributary systems) constructed in dry land



“Waters of the United States” and the Clean Water Rule

February 9, 2017

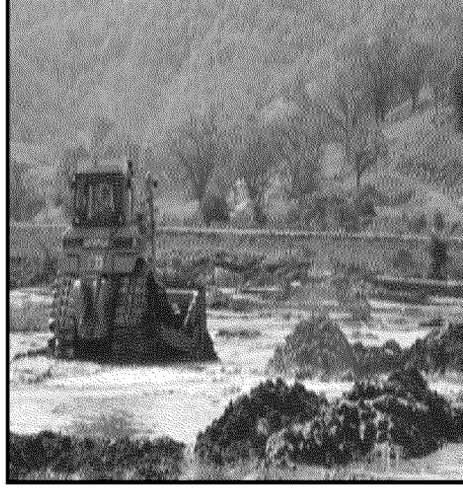
Overview of Presentation

- **Waters of the US in broad context**
  - CWA
  - Section 404
  - Longstanding regulations
  - Legal challenges
- **The Clean Water Rule**
  - Scientific basis
  - Rulemaking process
  - Content of CWR
  - Ongoing legal challenges

"Waters of the US" in Broad Context

- "Waters of the US" (WUS) is a threshold term under the Clean Water Act (CWA)
- All CWA programs address "navigable waters," defined in the statute as "waters of the United States including the territorial seas"
  - CWA did not define WUS; Congress left to agencies
- EPA and the Army Corps have defined WUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation

WUS and Section 404



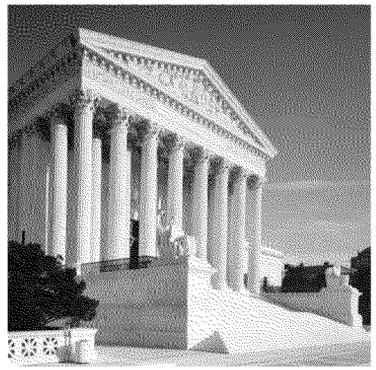
- Same definition of WUS applies to section 404 and other CWA programs
- Section 404 addresses the discharge of dredged or fill material into WUS
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
  - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
  - EPA and the Army Corps have jointly developed the definition of WUS, while EPA has the final policy responsibility for its scope

WUS and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
  - This is in part why WUS issues so often arise in the section 404 context
  - However, court decisions about the scope of WUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WUS, a 404 permit might not be required if activity is excluded under 404(f)
  - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit.

Mid-1980s Regulatory Definition of WUS

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Many, but not all, waters are considered to be WUS**:
  - Waters used/historically used/susceptible to use in interstate commerce
  - Interstate waters and wetlands
  - All other waters … the use, degradation, or destruction of which could affect interstate commerce
  - Impoundments of WUS
  - Tributaries of above waters
  - Territorial seas
  - Wetlands adjacent to above waters
  - Excludes: prior converted cropland, waste treatment systems



The Supremes Weigh In

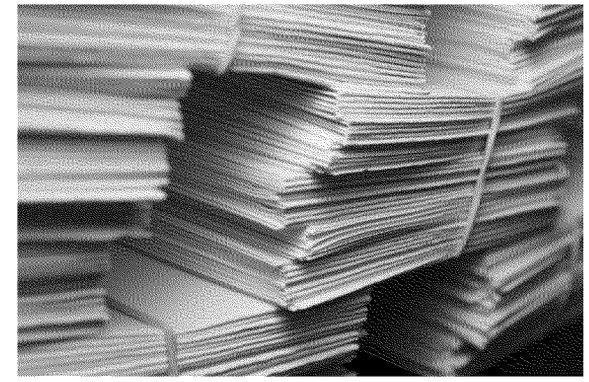
- ***Riverside Bayview*** (1985): Adjacent wetlands are properly part of WUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make Isolated waters WUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WUS includes
  - Scalia: "Relatively permanent" or at least seasonal waters; wetlands with a "continuous surface connection"
  - Kennedy: Waters with a "significant nexus" affecting physical, chemical, or biological integrity of downstream waters
  - All: WUS includes more than just waters that are navigable

Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinion.
  - These cases arise in more than 2/3 of all U.S. states
  - U.S. position: water jurisdictional if meets either the Kennedy or Scalia standards

- U.S. Circuit Courts of Appeal are split regarding what standard
  - Most hold either Kennedy or Scalia standard can be used
  - One held Kennedy standard only
  - None say Scalia standard only

- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WUS, but discussed its limitations and implications
- Many were confused how to implemented the unchanged definition in light of the Supreme Court decisions
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
  - Bipartisan Members of Congress, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR?

- The agencies wished to clarify protection for streams and wetlands that form the foundation of our nation's water resources. They feed the rivers, lakes and coastal waters that our health and economy depend on.
  - **People depend on clean water for their health:** About 117 million Americans get drinking water from streams that were vulnerable to pollution after *Rapanos*
  - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
  - **Our cherished way of life depends on clean water:** healthy ecosystems provide wildlife habitat and places to fish, paddle, and swim

What was the scientific basis for the CWR?

- The agencies' interpretation of the CWA's scope in the rule is guided by the **best available peer-reviewed science** – particularly as that science informs the determinations as to which waters have a "significant nexus" with traditional navigable waters (TNWs), interstate waters, or the territorial seas
  - Includes the Science Report summarizing **more than 1,200** peer-reviewed, published scientific studies which showed that small streams and wetlands play an important role in the health of larger downstream waterways like rivers and lakes
- The **Technical Support Document** utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The **Science Advisory Board** commented on both the Science Report and the proposed rule, concluding that much of the proposed rule was supported by available science

SAB Conclusions on the Proposed CWR

- SAB concluded that science **supports the conclusion** that the types of water bodies identified as "waters of the United States" in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters

- Though SAB was supportive of much of the rule, some of their comments **suggested that the proposed rule could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
  - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
  - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
  - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

What process was used to develop the CWR?

- Proposed rule subject to public comment May 2014
  - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
  - Over 400 stakeholder meetings
  - Interagency review
- Final rule published June 29, 2015
  - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation
  - Agencies using the mid-1980s definition during the stay